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In The

Supreme Court of the United States

October Term, 1996

BEAR VALLEY CHURCH OF CHRIST,

Petitioner,

v.

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, DENISE DeBOSE, and HOMER WOLFE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE NATIONAL BAPTIST CONVENTION OF AMERICA, INC., CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, CONSERVATIVE BAPTIST ASSOCIATION OF AMERICA, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, WISCONSIN EVANGELICAL LUTHERAN SYNOD

AND

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER BEAR VALLEY CHURCH OF CHRIST

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE NATIONAL BAPTIST CONVENTION OF AMERICA, INC., CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, CONSERVATIVE BAPTIST ASSOCIATION OF AMERICA, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, WISCONSIN EVANGELICAL LUTHERAN SYNOD

Pursuant to Rule 37 of the Rules of this Court, National Baptist Convention of America, Inc., Christian Reformed Church in North America, Conservative Baptist Association of America, International Church of the Foursquare Gospel, and Wisconsin Evangelical Lutheran Synod respectfully move the Court for leave to file Brief of Amici Curiae in the above entitled cause. Counsel for Denise DeBose and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose, has not replied to movants' letter requesting consent. All other parties have granted their consent and their letters accompany this motion.

All of your *amici curiae,* except the Wisconsin Evangelical Lutheran Synod, are major denominations with a membership in excess of 5,190,065 who along with their member bodies and Wisconsin Evangelical Lutheran Synod are directly threatened by the decision of the Supreme Court of Colorado.

The issues presented in the instant case are a matter of continuing importance to *amici curiae.* First, is the issue of freedom to determine one's own organizational and relational structure without regard to secular or other religious bodies. Second, is the issue of freedom from liability for secret, unauthorized conduct of one in authority in a religious body that is an anathema to the

beliefs, teachings, and exhorted practices of the body. *Amici curiae* offer an analysis of relevant court decisions on how these issues are to be tried and decided that is not found in the petitions for writ of certiorari of Bear Valley Church of Christ and Homer Wolfe. The failure to properly analyze and apply the relevant court decisions has caused the Colorado courts to misapply breach of fiduciary duty, negligent hiring or supervision and outrageous conduct in this case to Bear Valley Church of Christ. Therefore, the petitions for writ of certiorari do not adequately represent the interests of *amici curiae.*

For the above stated reasons, *amici curiae* respectfully urge the Court to grant this motion for leave to file the *amici curiae* brief in support of Petitioner Bear Valley Church of Christ.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

This case presents vital issues affecting the fundamental rights of every religious body. The first issue is the freedom to determine one's own organizational and relational structure without regard to secular or other religious bodies. The second issue is the freedom from liability for secret, unauthorized conduct of one in authority in the body that is an anathema to the beliefs, teachings and exhorted practices of the body. Causes of action for breach of fiduciary duty, negligent hiring or supervision and outrageous conduct have been wrongly applied in this case to make Bear Valley Church of Christ a victim of conduct, which if it did occur, the church should not be liable.

Amici Curiae National Baptist Convention of America, Inc., Christian Reformed Church in North America, Conservative Baptist Association of America, International Church of the Foursquare Gospel, and Wisconsin Evangelical Lutheran Synod are major denominations with a membership in excess of 5,190,065 who along with their member bodies and Wisconsin Evangelical Lutheran Synod are directly threatened by the decision of the

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[1] Counsel of record for all parties except one have consented to the filing of this brief and, pursuant to Rule 37, those letters of consent have been filed with the Clerk along with a motion for leave to file this brief.

No counsel for any party authored any portion of this brief. Except for a monetary contribution to a portion of the cost to prepare this brief paid by Church Mutual Insurance Company of Merrill, Wisconsin, this brief was paid for by members of Amici Curiae or their counsel.

Supreme Court of Colorado. This brief is not to be interpreted as any expression of approval of whatever conduct Homer Wolfe did or the way the elders handled the situation.

SUMMARY OF ARGUMENT

The liability imposed on Bear Valley Church of Christ is the result of the Colorado courts having failed to properly analyze when tort theories of liability are inapplicable to a religious body either because of the religion clauses of the First Amendment or the theories have no legitimate application to it. The testimony received at trial upon which liability was based is contrary to *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929), and *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 107-08 (1952).

ARGUMENT

I. PROPER ANALYSIS IS ESSENTIAL TO DETERMINE WHEN A RELIGIOUS BODY IS OR IS NOT CONSTITUTIONALLY OR OTHERWISE LAWFULLY PROTECTED FROM TORTIOUS CONDUCT OF ONE IN AUTHORITY ACTING IN AN ECCLESIASTICAL CAPACITY IN AN ECCLESIASTICAL ACTIVITY.

The First Amendment through the Fourteenth Amendment is applicable to tort litigation brought by private litigants. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). Therefore, tort litigation in state court cannot

do what the state itself is prohibited from doing by legislative or other action, according to *Sullivan*. 376 U.S. at 265.

In order to perceive the flawed reasoning of the Supreme Court of Colorado and the lower courts in this case, it is necessary to begin with a correct analysis for determining when a religious body is or is not entitled to constitutional or other lawful protection from tortious conduct injuring another person[2] by one in authority acting in an ecclesiastical capacity in an ecclesiastical activity. While the constitution should never be a shield to protect a religious body from conduct for which it is indeed responsible, the body likewise should never be deprived of that protection or other lawful protection through the application of secular or religious standards of negligence that impose responsibilities inconsistent with the ecclesiastical structure and functioning of the body. Therefore, those occasions when a religious body is properly liable will be addressed first in order to facilitate understanding when it is not liable and why.

Tortious or criminal conduct of one in a position of authority is either authorized or unauthorized. If it is authorized, the body is properly liable. If it is unauthorized, the body may be liable provided it has

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[2] The nature of the tortious conduct that is the subject of this brief is physically abusive or immoral in character which is continuous or is likely to be repeated. This brief will not address liability of a religious body for conduct such as driving a church vehicle in violation of traffic laws, failing to supervise children's activities at camp or similar activity, or failing to correct known property defects that result in injury or death.

breached a standard of care applicable to it. It is this framework that will be used to determine legitimate liability of a religious body for one in authority in light of the First Amendment and applicable tort law.

A. Religious Body Liability For Authorized Conduct

Religious conduct that violates criminal law is never protected. *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 166-67 (1878). Similarly, any religious conduct that threatens public safety, peace or order is not entitled to protection either. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1944); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Thus, when one in authority carries out any religious teaching or practice of the body like these, the body is properly liable. *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 762 P.2d 46, 60 (Cal. 1988), cert. denied, 490 U.S. 1084 (1989); *Van Schiack v. Church of Scientology of California, Inc.*, 535 F.Supp. 1125, 1135 (D.Mass. 1982).

B. Religious Body Liability For Unauthorized Conduct

Turning to conduct of a religious body that is contrary to its beliefs, teachings and practices, there are several situations where the body is liable for the conduct of one in authority and neither the First Amendment nor legitimate application of tort law is violated. Each of these situations assumes the religious body has no ecclesiastical structural or relational impediment to do what is described. The first is where the body with the power of

appointment knows that one under consideration for a position of authority has engaged in the conduct, yet makes the appointment. *Doe v. Redeemer Lutheran Church*, 531 N.W.2d 897, 902 (Minn. 1995). The second is like the first except the person is already in a position of authority when the body with the power of removal learns of the conduct, but fails to remove or deny this person the opportunity to repeat the conduct while acting in the position. *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 812-13 (Minn. App. 1992). The third is where a reasonable background check prior to placing one in a position of authority would have revealed this kind of conduct, but it was not done. *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991). The fourth is where the body with the power of removal and investigation receives credible information that one in authority is guilty of this conduct, but it is not investigated. *Doe v. Redeemer Lutheran Church*, supra. Finally, there is the situation similar to the last one where credible information is received, an investigation confirms the information, but no steps are taken to prevent the conduct. *Doe v. Redeemer Lutheran Church*, supra.

C. Limitations On Liability Of Religious Body For Unauthorized Conduct

Liability in each of the preceding situations cannot be based on the religious criteria or methodology of the body for placing or continuing one in an ecclesiastical position nor on the application of secular or religious standards to it. *Gonzalez v. Roman Catholic Archbishop*, supra; *Kedroff v. Saint Nicholas Cathedral*, supra; *Serbian*

Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *Byrd v. Faber*, supra. The following language from *Byrd* explains what must be done to avoid these intrusions:

> Specifically, the plaintiff must plead facts which indicate that the individual hired had a past history of criminal, tortious, or otherwise dangerous conduct about which the religious institution knew or could have discovered. . . .
>
> . . .
>
> While even the most liberal construction of the First Amendment will not protect a religious organization's decision to hire [or continue] someone who it knows is likely to commit criminal or tortious acts, the mere incantation of an abstract legal standard should not subject a religious organization's employment policies to state scrutiny.

565 N.E.2d at 590.

If a theory of liability does not fall into one of the preceding categories, it either will violate one or both of the religion clauses of the First Amendment or will fail in a necessary element of liability. For example, vicarious liability whether it is called respondeat superior or agency requires proof that the conduct of the one in authority must be in the course and scope of the duties in furtherance of the ministry of the body. *Dausch v. Rykse*, 52 F.3d 1425, 1435-36 (7th Cir. 1994); *Strock v. Pressnell*, 527 N.E.2d 1235, 1244 (Ohio 1988). But, conduct contrary to the beliefs and teachings of the religious body is in the language of *Dausch*, "a deviation" from the duties of the appointment and "not in furtherance" of the ministry. 52 F.3d at 1429. Statements that tortious conduct occurring

within the general scope of the authority are sufficient to establish vicarious liability is pure fiction to reach a result against a religious body. The fiction may be appropriate for secular businesses that receive a benefit from the conduct[3], but this is certainly not the case for a religious body due to the damage inflicted on its reputation. Regardless of whether one in authority is in a secular business or religious body "independent self-serving acts" are a departure from the responsibilities of the position, thus negating any liability of the principal, according to *Byrd*. 565 N.E.2d at 588.

Claims of negligent ordination or negligent placement in a position of ecclesiastical authority involving any evaluation of the ecclesiastical procedures are blatant violations of both religion clauses of the First Amendment. *Gonzalez v. Roman Catholic Archbishop*, supra; *Kedroff v. Saint Nicholas Cathedral*, supra; *Serbian Orthodox Diocese v. Milivojevich*, supra; *N.L.R.B. v. Catholic Bishop*, 440 U.S. 490, 507 (1979); *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985); *Simpson v. Wells Lamont Corporation*, 494 F.2d 490, 493-94 (5th Cir. 1974); *Schmidt v. Bishop*, 779 F.Supp. 321, 324 (S.D.N.Y. 1991). See also Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981). Because an ecclesiastical appointment is, in the language of Gonzalez, "a canonical Act, it is the

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[3] In Byrd, the court observed that an employer might be liable for an intentional tort where an employee injured an unruly patron of the business because it did not facilitate the peaceful operation of the business. 565 N.E.2d at 587.

function" of the religious body making the appointment "to determine what the essential qualifications . . . are and whether the candidate possesses them." 280 U.S. at 16. This process of selecting ecclesiastical authorities is "said to have federal constitutional protection," according to *Kedroff*. 344 U.S. at 116. Or, as well stated in *Rayburn*:

> [I]ntroduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.

772 F.2d at 1169-1170. Therefore, to require a religious body appointing a person to an ecclesiastical position to do more than an ordinary background check to discover prior criminal or tortious conduct would result in attempting to "foster excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971).

Likewise, negligent supervision or retention claims encounter a host of constitutional problems if the theories previously outlined seek to impose secular or religious standards on the body. *Serbian Orthodox Diocese v. Milivojevich*, supra; *Simpson v. Wells Lamont*, supra. This Court pointedly wrote in Milivojevich that personnel decisions by a religious body that are attacked in civil suits would require either a "generic" standard of care to be used by all religions in hiring and firing their ecclesiastical leaders or an application of the canonical laws of the religious body as the court sees proper, neither of which can escape the prohibitions of the First Amendment. 426

U.S. at 713. Since the relationship between an ecclesiastical leader and a religious body is, according to *Simpson*, the "life blood" of the body:

> The interaction between the church and its pastor is an integral part of church government. . . . The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern . . .
>
> The values underlying these two provisions [of the First Amendment] relating to religion have been zealously protected, *sometimes even at the expense of other interests of admittedly high importance*. . . . (Emphasis added.)

494 F.2d at 493-94. The argument that an ecclesiastical leader is comparable to a common law employee was very well met by the district court in *Schmidt*, to wit:

> Furthermore, any inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises the same kind of First Amendment problems of entanglement discussed above, which might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs. *Insofar as concerns retention or supervision, the pastor of a Presbyterian Church is not analogous to a common law employee.* He may not demit his charge nor be removed by the session, without the consent of the presbytery, functioning essentially as an ecclesiastical court. *The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation.* Church governance is founded in scripture,

> modified by reformers over almost two millennia. . . . *It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination,* a result violative of the text and history of the establishment clause. U.S. Const. Amend. I. (Emphasis added.)

779 F.Supp. at 332. It is the unimaginable variety of structure and governance of religious bodies that makes it unconstitutional to impose any generic or religious standards on them for supervision and removal. *Serbian Orthodox Diocese v. Milivojevich,* supra.

Pastoral counseling is as fundamentally religious as delivering a sermon to the congregation or teaching a class. *Dausche v. Rykse,* supra. No better expression of this has been stated than that in *Dausch,* to wit:

> In most, if not all, religious traditions, pastoral counseling – advice on matters of spiritual growth or moral responsibility – requires a great deal of knowledge and skill with respect to human psychology. Yet, as Illinois and, indeed, every state that has confronted the issue have noted, such pastoral counseling is clearly and directly centered on matters of religion, and claims of negligence are not cognizable in the civil courts.

52 F.3d at 1433. It is so integral a part of the free exercise of religion that every jurisdiction recognizes a pastor-parishioner privilege grows out of it. No state thus far has sought to regulate it by licensing. The qualifications

for religious counseling by necessity must be determined by the religious body and, therefore, cannot serve as a basis for any civil litigation. *Gonzalez v. Roman Catholic Archbishop of Manila*, supra; *Serbian Orthodox Diocese v. Milivojevich*, supra; *Rayburn v. General Conference of Seventh Day Adventists*, supra. To permit or require others in the religious body to participate in the counseling process would not only jeopardize the pastor-parishioner privilege, but would be generally contrary to the beliefs of the body. Similarly, the imposition of standards of supervision on pastoral counseling violates the Free Exercise Clause, as well as the Establishment Clause. *Watson v. Jones*, 80 U.S. (13 Wal.) 679 (1871); *Serbian Orthodox Diocese v. Milivojevich*, supra; *Lemon v. Kurtzman*, supra; *Walz v. Tax Comm'n*, 397 U.S. 664, 669-70 (1970). See also Laycock *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 80 Colum. L. Rev. 1373 (1981); Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984).

Preaching, teaching and pastoral counseling are religious per se and have occurred for centuries. Unusual or unconventional methods used in any of these does not change what they are or cause them to lose their constitutional protection. *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 713-14 (1981). In *Thomas*, it is correctly proclaimed:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that

> question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

450 U.S. at 713-14.

II. SUPREME COURT OF COLORADO DECISION VIOLATES PROPER ANALYSIS FOR IMPOSING LIABILITY ON THE CHURCH

Measuring the reasoning of the Supreme Court of Colorado and the lower courts holding Bear Valley Church of Christ liable by the foregoing analysis demonstrates its erroneousness. The "threshold matter", according to the supreme court, is whether "Bear Valley asserted a sincere religious basis for Wolfe's use of therapeutic massage with counselees." Appendix, page 12 of Bear Valley petition. This is clearly contrary to *Thomas*. The issue is not whether the pastor's method had a doctrinal foundation, but was it employed in furtherance of a religious practice. A religious practice, according to *Thomas*, "need not be acceptable, logical, consistent, or comprehensible to others," yet it is still protected by the First Amendment. 450 U.S. at 713-14. The effect of the Colorado court decision is to hold that unless everything done in a religious activity such as counseling is clearly religious with some doctrinal basis for it, the counseling is transformed thereby into a non-religious activity without constitutional protection which cannot stand in the face of *Thomas*.

Attempting to determine whether conduct during a religious activity is or is not religious is also in conflict with *Lemon v. Kurtzman*, supra, and *Walz v. Tax Comm'n*, supra. If a statute or ordinance were enacted to set out guidelines for such a determination, it would contravene both religion clauses. *Lemon v. Kurtzman*, supra; *Thomas v. Review Board of the Ind. Employment Secur. Div.*, supra. No greater entanglement in religious matters can be imagined than to review every method used in a religious endeavor.

If by "threshold matter" the Colorado court meant that tortious conduct precludes constitutional protection for the conduct, this could only apply to the pastor. *Reynolds v. United States*, supra; *Cantwell v. Connecticut*, supra. But, it could not apply to the church. *Dausch v. Rykse*, supra; *Strock v. Pressnell*, supra. Abuse of a counselee was not a teaching or practice of the church. It was not authorized, and it did not further the ministry of the church. Therefore, no vicarious liability is appropriate.

The Colorado courts as well as the parties here erroneously contend that sincerity of religious belief is a necessary element of a constitutional defense to the Respondents' claims. This error has as its genesis a failure to understand when sincerity of belief is proper and a misreading of *United States v. Ballard*, 322 U.S. 78 (1944), along with other cases addressing the subject.

Sincerity of belief is only a proper issue where a religious practitioner seeks an exemption from a governmental regulation affecting the populace at large or a portion of it. *Hernandez v. Commissioner*, 490 U.S. 680 (1989), (tax exemption case); *United States v. Seeger*, 380

U.S. 163 (1965), (exemption from military service); *Wisconsin v. Yoder,* 406 U.S. 205 (1972), (exemption from compulsory attendance at school); *Sherbert v. Verner,* 374 U.S. 398 (1963), (employment benefit requirements); *Frazee v. Illinois Employment Security Dept.,* 489 U.S. 829 (1989), (employment benefit requirements); *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136 (1987), (employment benefit requirements). Cases such as *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988), *Moses v. Diocese of Colorado,* 863 P.2d 310 (Colo. 1993), cert. denied 114 S.Ct. 2135 (1994), and *Erickson v. Christenson,* 781 P.2d 383 (Or. 1989), cited by the Colorado court below and Respondents do not have a sincerity issue because the alleged conduct is not religious. Even if it were sincere, there is no benefit because of *Reynolds v. United States,* supra, and *Cantwell v. Connecticut,* supra. This is a disingenuous argument.

United States v. Ballard, supra, was a suit attacking practices within a ministry that were religious in nature. The Ballards represented in their writings that they had "the power to heal persons of ailments and diseases." 322 U.S. at 80. This Court ruled that "the indictments" attacked not only the propriety of the jury considering the truth of their beliefs, but also the sincerity with which they were held, according to the following:

> Their demurrer and motion to quash made clear their position that the issue should be withheld from the jury on the basis of the First Amendment. Moreover, their position at all times was and still is that the court should have gone the whole way and withheld from the jury both that issue and *the issue of their good faith.* . . . Their

> arguments that the truth of their religious doctrines or beliefs should have gone to the jury when the question of their good faith was submitted was and is merely an alternative argument. They never forsook their position that the indictment should have been dismissed and that *none of it was good*. . . . Whatever this particular indictment might require, the First Amendment precludes such a course. (Emphasis added.)

322 U.S. at 85, 86. In spite of the fact that the trial court only tried the sincerity of beliefs and withheld an issue on the truth of them, the preceding language is very clear that the First Amendment precluded "this particular indictment." 322 U.S. at 86.

The final basis for holding the church liable was negligent hiring, supervising, disciplining, and discharging of the pastor. Appendix, page 17 of Bear Valley petition. Concerning negligent hiring, the court found expert testimony was received at trial that the pastor was not qualified for his position because his only experience was as a pastor. As to negligent supervision, the court pointed to expert testimony that the pastor was not supervised by any qualified individual. All of this testimony is contrary to *Gonzalez v. Roman Catholic Archbishop*, supra, and *Kedroff v. Saint Nicholas Cathedral*, supra, because the elders are the governing body of the church and have the constitutional prerogative to determine the qualifications of its ministers and how they are supervised.

The expert testimony that the pastor's counseling techniques were unreasonable though not tortious per se, and that the elders received complaints from other church members of his techniques were, in the opinion of

the court, sufficient to put the elders on notice to investigate and suspend the pastor because of the foreseeability of harm. This is the "generic" standard of care testimony condemned in *Milivojevich*. 426 U.S. at 713.

Even if the elders had investigated the pastor's counseling techniques after receiving the first complaint, they would have discovered nothing criminal or tortious. The district court aptly wrote at the end of *Schmidt*, to wit:

> It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop.

779 F.Supp. at 332.

III. BREACH OF FIDUCIARY DUTY IS CLERGY MALPRACTICE IN DISGUISE AND FAILS TO FIND SUPPORT IN ANY LEGITIMATE THEORY OF LIABILITY FOR A RELIGIOUS BODY.

To apply breach of fiduciary duty to a religious body that has not authorized tortious conduct requires a negligence standard. It is either a secular or religious standard with either being contrary to *Milivojevich*. Furthermore, this theory is nothing more than clergy malpractice which has thus far been rejected by every court to whom it has been presented. *Dausch v. Rykse*, supra; *Schmidt v. Bishop*, supra; *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 911 (Neb. 1993); *Moses v. Diocese of Colorado*, supra; *Byrd v. Faber*, supra; *Strock v. Pressnell*, supra; *Destefano v. Grabrian*, supra; *Nally v. Grace Com. Church of*

the Valley, 763 P.2d 948 (Cal. 1988), cert. denied 490 U.S. 1007 (1989).

The federal courts and several state courts have correctly analyzed breach of fiduciary duty to be clergy malpractice in disguise. *Dausch v. Rykse*, supra; *Schmidt v. Bishop*, supra; *Schieffer v. Catholic Archdiocese of Omaha*, supra; *Strock v. Pressnell*, supra. In *Dausch*, a member of a church sued the pastor and the church because of sexual relations she had with the pastor to whom she had come for counseling. 52 F.3d at 1427. The Seventh Circuit affirmed the dismissal of the breach of fiduciary duty claim reasoning:

> At the outset the district court concluded that, even though the church defendants might be characterized as her "spiritual and religious advisors" . . . that relationship was not, under the law of Illinois, that of a fiduciary. With respect to Rykse, the court concluded that he *did not have a fiduciary duty, but rather a general duty* to refrain from violating the law. More fundamentally, the court determined that the *allegation of fiduciary duty was simply an elliptical way to state a clergy malpractice claim*, a cause of action that it had already held to be not recognized in Illinois. (Emphasis added.)

52 F.3d at 1428-29. Likewise, the Supreme Court of Nebraska ruled the same way in *Schieffer v. Catholic Archdiocese of Omaha*, supra. The suit was brought by a parishioner against a priest and the archdiocese because of a sexual relationship with the priest that arose out of a counseling relationship. 508 N.W.2d at 909-10. In affirming the district court, the supreme court followed the reasoning in *Schmidt v. Bishop*, supra, to wit:

> [I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence. . . . *[A]s with her negligence claim, [the plaintiff's] fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in malpractice.* (Emphasis added.)

508 N.W.2d at 912. The court observed that breach of fiduciary duty had been accepted in *Destefano v. Grabrian*, supra, and *Erickson v. Christenson*, supra, but did not find the reasoning in them persuasive. 508 N.W.2d at 912.

It is the breach of a "general duty" described in *Dausch* by the pastor that may have occurred in this cause, but there was no breach of a "fiduciary duty" by either the pastor or the church. Breach of fiduciary duty cannot be a basis for vicarious liability, even according to *Destefano v. Grabrian*, supra, because the pastor was not carrying out any belief or teaching of the church. 763 P.2d at 287. The church can have no liability because the elders had no knowledge of alleged tortious conduct by the pastor until late in discovery just prior to trial. *Mrozka v. Archdiocese of St. Paul & Minneapolis*, supra; *Doe v. Redeemer Lutheran Church*, supra. It was not reasonably foreseeable to the elders based on the knowledge they had that someone in the future might be injured, according to both *Mrozka* and *Doe*.

CONCLUSION

This Court is presented with a rare opportunity to set forth an analysis for all of the other courts, federal and state, to use in how to adjudicate suits against religious bodies and those in authority in them. Religious bodies give so much to help so many that they should not be subjected to unlawful litigation that threatens their very existence.

Respectfully submitted,

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